No. 85-2109

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

LERAKOLI, INC.; LONDON STAR, NEW YORK, INC.; TACHE ET CIE, S.A.; LIEBER & SOLOW, INC.; SOUCOL, LTD.; ROUGH DIAMOND TRADERS, INC.; and SEVEN EIGHTEEN FIFTH AVENUE CORP.,

Petitioners,

—against—

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 20, 1986

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Questions Presented

1. Whether the federal courts have subject-matter jurisdiction in a removed action over a non-diverse party against which solely state-law claims are asserted?

2. Whether the courts of the United States should create federal common law in a dispute between private parties over the loss of property handled as air mail?

3. If federal common law is applicable, whether a negligent agent is entitled to the statutory limitation of liability protecting its principal?

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In The
SUPREME COURT OF THE UNITED STATES
October Term 1985

LERAKOLI, INC.; LONDON STAR, NEW YORK, INC.; TACHE ET CIE, S.A.; LIEBER & SOLOW, INC.; SOUCOL LTD.; ROUGH DIAMOND TRADERS, INC.; and SEVEN EIGHTEEN FIFTH AVENUE CORP.,

Petitioners,

—against—

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Lerakoli, Inc. et al. (collectively "Lerakoli"),* request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on 5 February 1986, which affirmed a final judgment of the United States District Court for the Eastern District of New York. Specifically, Lerakoli requests that this action be remanded to the district court with the instruction to remand the case to the New York state court where the action originated.

Opinions Below

The opinion of the Court of Appeals, reported at 783 F.2d 33 (2d Cir. 1986), is reprinted in the Appendix at A1. The opin-

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*Petitioners' designation of corporate relationships pursuant to Rule 28.1 is stated at page A39. References in the form "A " are to the pages of the Appendix to this petition.

ions of the District Court, unofficially reported at 17 Av. Cas. (CCH) 18,107 (E.D.N.Y. 1983) and 19 Av. Cas. (CCH) 17,290 (E.D.N.Y. 1985), are reprinted at A12 and A16, respectively.

Jurisdiction

The judgment of the Court of Appeals issued on 5 February 1986 and was entered the same day (A20). Lerakoli subsequently made a timely motion for a rehearing; and this motion was denied by the court on 24 March 1986 (A22). This petition is being filed within ninety days of the circuit court's denial of a rehearing. The Supreme Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

Treaty and Statutory Provisions Involved

The treaty and statutory provisions involved are Article 44 of the Lausanne Convention and 28 U.S.C. §1441, which are set out at pages A23 and A24, respectively.

Statement of the Case

The Petitioners are the owners of 11 packages mailed in New York City in 1980. The packages contained diamonds with a total value of about $4.8 million and were to go by registered air mail to Belgium. The United States Postal Service ("USPS") accepted these packages, put them into mail sacks, and then handed the sacks over to Pan American World Airways, Inc. ("Pan Am") for air transportation to Belgium. Sometime after Pan Am accepted possession of the mail, Lerakoli's packages disappeared.

In October 1982 Lerakoli started this action in state court and contended that Pan Am was liable for the loss based on common-law principles of bailment, conversion and negligence. A

claim was also asserted against the USPS under federal law, specifically the so-called Lausanne Convention.*

The action was removed to the federal district court by the defendants in November 1982, and the USPS then moved to dismiss the complaint against it. Pan Am also moved for a dismissal and claimed that it had the same immunity from liability as that enjoyed by the USPS. At a hearing on these motions on 8 January 1983, the district court granted the USPS motion. A final judgment was accordingly entered, which was not appealed.

In its decision of 15 February 1983 (A12), the district court also held that for the claims founded on negligence and bailment Lerakoli could not recover from Pan Am for more than the USPS's limit of liability, which was $15.76 per package. The rationale for this holding was that Pan Am, as sub-bailee or agent of the USPS, was entitled to the same limited liability as the Postal Service. Lerakoli could, however, recover in full on the basis of conversion; and the district court gave Lerakoli an opportunity for discovery on this issue.

Following discovery, Pan Am renewed its request to limit its liability to $15.76 per package; and the district court granted the motion (A16). By analogy to decisions concerning federal carrier law, the district court held that Lerakoli was required to establish clearly that Pan Am had contributed to the mail's disappearance by some intentional act. Because this burden was not satisfied, Pan Am was entitled to limit its liability.

Lerakoli appealed and contended that New York, and not federal, common law was applicable to its claims against Pan Am

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*Formally known as the Universal Postal Union Convention, 27 U.S.T. 345, T.I.A.S. No. 8321, *entered into force* 1 January 1976. This postal convention is not a true treaty because it has not received the Senate's advice and consent. Instead, it is considered an administrative regulation. *See, Four Packages of Cut Diamonds* v. *United States,* 256 F. 305 (2d Cir. 1919).

and that the airline was not entitled to shield itself with the Postal Service's limitation.

In its decision of 5 February 1986 (A1), the court of appeals rejected Lerakoli's contentions and held that federal common law was applicable to the relationship between Lerakoli and Pan Am and that the airline was entitled to the limitation afforded to postal administrations under the Lausanne Convention. Moreover, federal law required affirmative proof of wilful misconduct in order to establish conversion.

Lerakoli requested a rehearing on the matter and pointed out the lack of subject-matter jurisdiction in the federal courts. The petition for rehearing was denied on 24 March 1986 (A22).

Reasons for Granting the Writ

Certiorari should be granted because this case concerns the significant issues of (1) the exercise of pendent-party jurisdiction, (2) the creation of federal common law, and (3) the ability under federal common law of a negligent agent to rely on a statutory limitation of liability protecting the principal. On all these points the Second Circuit ruled contrary to the decisions of this Court, and it is consequently necessary to review the lower court's decision so as to bring it into conformity with this Court's precedents.

POINT I

The federal courts lack subject-matter jurisdiction over these state-law claims.

As noted above, Lerakoli started this action in state court. Recovery was sought against the Postal Service under the Lausanne Convention and against Pan Am on the basis of common law rights.

If, as Lerakoli submits, the common law governing its relationship with Pan Am is state and not federal, then removal of these state claims against Pan Am was improper and, more importantly, the federal courts have never had subject-matter jurisdiction over these claims. Consequently, even at this stage of the proceeding, the case should be remanded to state court. *See, e.g., Gardner and Florence Call Cowles Foundation* v. *Empire Inc.*, 754 F.2d 478 (2d Cir. 1985); *Givens* v. *W.T. Grant Co.*, 472 F.2d 1039 (2d Cir. 1972).

This conclusion turns upon the issue of pendent-party jurisdiction, a subject that the Court has described as "subtle and complex." *Aldinger* v. *Howard*, 427 U.S. 1, 2, 18 (1976). Although restricting its decision to the §1983 claim before it, the Court in *Aldinger* disapproved of the use of a jurisdictional statute to open the federal courts to state law claims against pendent parties. The Court in essence held that the issue was largely one of statutory construction and that the scope of the jurisdictional statute was to be gauged by the statute providing the cause of action: "[T]he reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which the federal judicial power has been extended by Congress." 427 U.S. at 17; emphasis in original.

On Lerakoli's claim against the Postal Service, the district court would have original, although not exclusive, jurisdiction under 28 U.S.C. §1339 or 39 U.S.C. §409.* Lerakoli's cause of action against the USPS is provided by Article 44 of the Lausanne Convention, which provides in pertinent part:

> 1. Postal administrations shall be liable only for the loss of registered items. Their liability shall be as binding for items conveyed *à découvert* as for those forwarded in closed mails. (A23)

This language is very narrow; and there is no indication, either

*The Postal Service relied on this latter provision in its removal papers.

explicitly or implicitly, of any intent to create a private cause of action in favor of mail senders against independent contractors such as Pan Am. *See Cort* v. *Ash*, 422 U.S. 66 (1975). Consequently, as in *Aldinger*, the provision creating the cause of action limits the federal court's power to exert jurisdiction over a pendent party.

There is no other basis for federal jurisdiction over Pan Am. Diversity of citizenship does not exist because Pan Am and all of the plaintiffs, except one, are New York corporations. For the reasons described in the following section, Lerakoli's claim against Pan Am does not arise under federal law. The Postal Service never cross-claimed against Pan Am, so there is no question of ancillary jurisdiction.

Yet *Aldinger* is insufficient to resolve the matter because, unlike *Aldinger*, the present case involves removal. Thus the issue is whether the removal statute, 28 U.S.C. §1441 (A24), provides a basis for jurisdiction that would otherwise be lacking. Lerakoli contends that this provision does not do so.

Subsection (b) of §1441 allows removal only of a case that the plaintiff might have brought in federal court directly, and thus it provides no additional basis for jurisdiction. *Charles D. Bonanno Linen Service, Inc.* v. *McCarthy*, 708 F.2d 1, 8 (1st Cir.), *cert. denied*, 464 U.S. 936 (1983). Subsection (c), however, allows the district court to take jurisdiction of a "separate and independent" cause of action that it might not otherwise have statutory authority to hear. Yet under the holding of *America Fire & Casualty Co.* v. *Finn*, 341 U.S. 6 (1951), these state claims against Pan Am are not "separate and independent" from those against the Postal Service.

It is well-settled that when a plaintiff seeks to recover damages for a single wrong arising from "an interlocked series of transactions," *Finn, supra*, 341 U.S. at 14, and sues several defendants, the plaintiff is not asserting "separate and independent" claims

that warrant removal under §1441(c). *See, e.g., Gardner and Florence Call Cowles Foundation, supra;* 1A *Moore's Federal Practice,* ¶0.163[4.-5] (1985).

Each plaintiff is claiming for a single wrong, the loss of its property. The claims against the Postal Service are predicated on federal law, and the claims against Pan Am are on different grounds under state law. Yet only one recovery is sought. Hence the "separate and independent" requirement of §1441(c) is not satisfied.

In essence, then, *Aldinger* closes the door to the "pendent party" claims against Pan Am, and §1441 does not reopen it. Since the federal courts lack subject-matter jurisdiction over the claims against Pan Am, these state-law claims must be remanded to the state court where they originated.

The above analysis is taken from Judge Breyer's opinion in *Charles D. Bonanno Linen Service, Inc., supra,* 708 F.2d at 6-11; and his reasoning should have been adopted by the Second Circuit in the present case.

Remand is particularly appropriate in this case when the federal party was dismissed from the litigation shortly after removal. Remand also avoids the need for the federal court to surmise as to the outcome of novel issues of state law. See A9, 11.

POINT II

The circuit court erroneously created federal common law in an action between private parties.

Lerakoli sued Pan Am on claims of negligence, bailment, and conversion arising from the airline's wrongful handling of Lerakoli's property carried as registered mail. Lerakoli's causes of action against Pan Am did not arise under any statute or treaty,

but rather were founded on rights under the common law. The question is: Is the governing common law state or federal? The circuit court concluded that federal common law was applicable and thereby misapplied the analysis required by the prior decisions of this Court.

The Court in *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, 78 (1938), stated that there is "no federal general common law" and later cautioned in *Wheeldin* v. *Wheeler,* 373 U.S. 647, 651 (1963), that the instances for the courts to develop federal common law are "few and restricted."

Similarly, in *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63 (1966), the Court held that the creation of federal common law was for an exceptional circumstance:

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. (At 68; quoted with approval in *Miree* v. *DeKalb County,* 433 U.S. 25, 31-32 (1977).)

More recently, in *Texas Industries Inc.* v. *Radcliffe Materials, Inc.,* 451 U.S. 630 (1981), the Court provided the guiding principle on the creation of federal common law:

> Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the

> authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control. (At 641; footnotes omitted.)

The case at bar involves a dispute between private parties, and the Government has sharply contrasting interests in the outcome. On the one hand, the Postal Service has an interest in promoting the safe handling of the mail and in protecting those who rely on the mail. The Government also, however, has an interest in the independent contractors, such as Pan Am, who provide transportation services. Each interest will be furthered only if the federal rule of law to be created favors that particular group. Lerakoli submits that the extent to which the interest of independent contractors should be favored over those relying on the mails is a policy question for the Congress.

Nevertheless, the circuit court determined that "We find that the federal interest in maintaining a uniform scheme of regulation of international mail requires the application of uniform liability standards for claims arising from the nondelivery of the mail." A9-10. Lerakoli agrees that this proposition is true with respect to claims against the U.S. Postal Service. In that situation the "rights and obligations of the United States", *Texas Industries Inc., supra,* are at issue.

Yet with respect to one New York corporation (Lerakoli, Inc.) suing another New York corporation (Pan Am) for negligence, bailment, or conversion claims arising from the mishandling of property, Lerakoli contends that there is no compelling reason to create federal common law on the question.

Not creating a uniform, federal common law in this case means exposing Pan Am to different liabilities in different states. That result is one of the drawbacks of a federal system. Yet it is also the situation faced by railroads. *Compare Conwell* v. *Vorhees,* 13 Oh. 523 (1844), *with Sawyer* v. *Corse,* 58 Va. (17 Grat.)

230 (1867). It is also a situation that presumably could be changed if the Legislature so desired.

The Second Circuit in *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981), was also faced with this issue of federal common law. In that case veterans claimed against several chemical companies for injuries suffered in the line of duty, and the appeals court rejected the argument that federal common law should be created. The claims there were brought against private manufacturers, not the United States, and did not directly implicate the rights and duties of the United States. The circuit court held that there was no identifiable federal policy at stake warranting the creation of federal common law rules.

Lerakoli respectfully submits that if the Government's interest in military matters and a war effort do not justify the creation of federal common law, then neither is there an identifiable federal interest requiring the courts of the United States to create for Pan Am's benefit "uniform liability standards for claims" (A9).

POINT III

Federal common law, if applicable, should not be changed to protect negligent airlines.

In section II.A of its decision (A5-8), the circuit court holds that Pan Am can take advantage of the liability limitation afforded to the USPS under Article 44 of the Lausanne Convention. If federal common law is applicable, then Lerakoli contends that in reaching its conclusion the lower court failed to follow principles stated by this Court.

In *Robert C. Herd & Co., Inc.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), the Court was faced with the issue of whether a shipowner's agent could take advantage of the limita-

tion provisions of 46 U.S.C. §1304(5). In rejecting the argument that the agent could use the statutory limitation available to its principal, the unanimous Court held that:

> From its early history this Court has consistently held that an agent is liable for all damages caused by his negligence, unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged. . . . This Court has several times held that an agent's only shield from liability "for conduct harmful to the plaintiff . . . is a constitutional rule of law that exonerates him." *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 257 U.S., at 567; *Brady* v. *Roosevelt S.S. Co.*, 317 U.S., at 584. Any such rule of law, being in derogation of the common law, must be strictly construed, for "[n]o statute is to be construed as altering the common law, farther than its words impart. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565; see *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437.
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> * * *
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> Under the common law as declared by this Court, petitioner was liable for all damages caused by its negligence unless exonerated therefrom, in whole or in part, by a constitutional rule of law. No statute has limited its liability, and it was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract. It follows that petitioner's common-law liability for damage caused by its negligence was in no way limited, and the judgment below so holding was correct and must be affirmed. (359 U.S. at 303-5, 308.)

In addition to *Herd*, the circuit court also failed to distinguish, or even to discuss, the line of cases from this Court holding that an independent contractor acting on government business is sub-

ject to liability when (as Lerakoli claims is the case here) the work is negligently done. See *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1939); *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922); see also *Merritt, Chapman & Scott Corp.* v. *Guy F. Atkinson Co.*, 295 F.2d 14 (9th Cir. 1961); *Green* v. *ICI America, Inc.*, 362 F. Supp. 1263, 1265 (E.D.Tenn. 1973).

In support of its conclusion that the airline can rely on the protection afforded to the USPS, the Second Circuit relied on three cases: *Berger* v. *34th Street Garage*, 3 N.Y.2d 701, 171 N.Y.S.2d 824, 148 N.E.2d 883 (1958); *Schoeffer* v. *United Parcel Service of New York, Inc.*, 277 A.D. 569, 101 N.Y.S.2d 451 (1st Dep't 1950); *Caribe Diamond Works, Inc.* v. *Eastern Airlines, Inc.*, No. 71-2875 (S.D.N.Y. June 24, 1974) (not officially reported) (included in the Appendix at A25).

Berger and *Schoeffer* are distinguishable from the present action because those New York cases involved limitations of liability to which the plaintiffs had agreed as a matter of contract. In the matter at hand, by contrast, the only limitation that has been mentioned is that contained in Article 44 of the Lausanne Convention (A23).

Caribe Diamond, which concerned domestic mail, did not involve a claim for negligence or conversion as exists in the present matter. Furthermore, that portion of the decision dealing with limitation of liability is clearly *dicta*, as was recognized by the trial judge in his opinion at A37. Judge Brieant was not required to consider any of the substantive questions because the plaintiff had failed in its proof, whatever the legal validity of its claim.

Further, in *Caribe Diamond* there was also an element of consent applicable to the limitation of liability. As the district court points out, for this domestic mail shipment the plaintiff had the option of fees. If the lower fee was paid (as was done) the USPS liability was limited to a maximum of $1,000 (A37).

The present case involves international mail to Belgium, and for such mail there was no insurance with the USPS. Lerakoli did take advantage of registration, but that is only a security service offered to senders. Unlike *Caribe Diamond,* Lerakoli had no choice of rates; and it is the existence of a choice to declare a higher value (and pay a correspondingly higher freight rate) that justifies a limitation of liability in a contract. *Union Pacific Railroad Co.* v. *Burke,* 255 U.S. 317 (1921).

What is at issue is not a contractual limit of liability. The limit is one imposed by a postal convention, which has the force of an administrative regulation. *Four Packages of Cut Diamonds* v. *United States, supra; Standard Fruit and Steamship Co.* v. *United States,* 103 Ct.Cl. 659, 682 (1945). As this Court held in *Herd, supra,* "Any such rule of law, being in derogation of the common law, must be strictly construed, ..." 309 U.S. at 304.

The Second Circuit also analogizes to the Warsaw Convention.* The analogy is not a good one, however, as is shown by examining the circuit court's own decision in *Reed* v. *Wiser,* 555 F.2d 1079 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977). In *Reed* the appeals court considered the official French language of the Convention and the views of civil law commentators to show how the drafters' intention had been to protect employees such as pilots. Furthermore, in 1955 any doubt as to the protection extended to agents was removed by the Hague Protocol,** which has been widely adopted by the Convention's signatories.

The factors present in *Reed* are precisely what are missing in the Second Circuit's interpretation of the Lausanne Convention.

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*Formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970).

**Hague Protocol, done September 28, 1955, 478 U.N.T.S. 371, *reprinted in* A. Lowenfeld, *Aviation Law* 955 (2d ed. Doc. Supp. 1981).

There has been nothing cited, such as legislative history, case law, or commentators, to indicate that the drafters of the Lausanne Convention intended the term "postal administrations" in Article 44 to include independent contractors such as Pan Am. There is simply no justification to stretch the postal convention language beyond its plain meaning. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982); *Maximov* v. *United States*, 373 U.S. 49, 54 (1963); *The Five Per Cent. Discount Cases*, 243 U.S. 97, 106 (1917) ("a strong presumption that the literal meaning is the true one").

If federal common law governs the relationship between Lerakoli and Pan Am, then the lower courts should have followed this Court's analysis in *Herd*. In failing to do so, the circuit court made a fundamental error on a matter of importance to those who use and rely on the mails.

Conclusion

Certiorari should be granted.

Respectfully submitted,

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June 20, 1986

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 196—August Term, 1985
(Argued October 22, 1985 Decided February 5, 1986)
Docket No. 85-7503

LERAKOLI, INC.; LONDON STAR, NEW YORK, INC.; TACHE ET CIE, S.A.; LIEBER & SOLOW, INC.; SOUCOL, LTD.; ROUGH DIAMOND TRADERS, INC.; and SEVEN EIGHTEEN FIFTH AVENUE CORP.,

Plaintiffs-Appellants,

—against—

PAN AMERICAN WORLD AIRWAYS, INC.,

Defendant-Appellee.

Before:

PIERCE, MINER and DAVIS*,

Circuit Judges.

Appeal from two orders of the United States District Court for the Eastern District of New York (Costantino, J.) applying the liability limitation of the Lausanne Convention to claims against an agent of the United States Postal Service arising from the nondelivery of registered mail and applying federal common law to a claim for conversion of international mail.

Affirmed.

JOHN R. FOSTER, New York, N.Y., (Waesche, Sheinbaum & O'Regan, New York, N.Y. of counsel), *for Plaintiff-Appellant.*

*Honorable Oscar H. Davis, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Opinion of the United States Court of Appeals for the Second Circuit

JOHN R. ROMANS, New York, N.Y., (Curtis, Mallet-Prevost, Colt & Mosle, New York, N.Y., of counsel), *for Defendant-Appellee.*

MINER, *Circuit Judge:*

The issues presented by this appeal are whether an agent of the United States Postal Service ("USPS") may assert the liability limitation of the United States Postal Union Convention, January 1, 1976, 27 U.S.T. 345, T.I.A.S. No. 5231 ("Lausanne Convention"), and whether federal or New York common law applies to a mail sender's claim of conversion against a carrier of international mail performing services for the USPS. We hold that an agent of the USPS is entitled to assert such a limitation and, regardless what law is applied, the conversion claim must be dismissed, since appellants have failed to present any evidence of willful or intentional conduct on the part of the mail carrier. We therefore affirm the district court's decision.

I. Background

Appellants, collectively referred to as "Lerakoli," are the owners of eleven packages, alleged to have contained diamonds, delivered to the USPS in New York City for shipment to Belgium via registered mail in 1980. Upon receipt of the packages, the USPS placed them in three separate mail sacks and delivered the sacks to its mail carrier, appellee Pan American World Airways, Inc. ("Pan Am"), for shipment to Belgium postal authorities.[1] Two of these sacks never were delivered in Belgium and never were recovered. The third sack was delivered in Germany, where

[1]Pan Am was given AV-7 forms with each sack. These forms gave the serial numbers of the sacks and their gross weights but did not state the contents of each package.

postal authorities discovered, upon breaking the seal, that Lerakoli's packages were missing from the sack.

Lerakoli commenced this action against the USPS and Pan Am, alleging liability for the loss on the part of the USPS under the Lausanne Convention, an international agreement which establishes a regulatory scheme for the transport of international mail, and on the part of Pan Am under common law principles of bailment, negligence and conversion.[2] On January 26, 1983, at the conclusion of a hearing on motions by the USPS and Pan Am for summary judgment, the district court dismissed the claims against the USPS on the ground that it had tendered to Lerakoli its limit of liability under Article 44 of the Lausanne Convention.[3] Article 44 limits the liability of "postal administrations" for the loss of registered mail to "40 francs [$15.76] per item."

On February 15, 1983, the district court issued a Memorandum of Decision and Order granting Pan Am's motion as to the bailment and negligence claims on the ground that the liability limitation of the Lausanne Convention also applied to Pan Am as an agent of the USPS. *Lerakoli, Inc.* v. *Pan American Airways, Inc.*, No. 82-3663 (E.D.N.Y. Feb. 15, 1983). However, the court denied Pan Am's motion as to the conversion claim, with leave to renew, following the established rule that liability limitations may not be applied to diminish liability for an intentional act of misconduct. The court therefore permitted Lerakoli an opportunity for discovery on the conversion claim. On April 17, 1985, after Pan Am's renewal of its motion, the court issued a second Memorandum of Decision and Order wherein it decided that federal law should apply to a conversion claim against a

[2]The action initially was commenced in New York State Supreme Court and was removed to federal district court by the USPS.

[3]Lerakoli does not appeal this aspect of the district court's decision.

carrier-agent of the USPS. *Lerakoli, Inc.* v. *Pan American Airways, Inc.*, No. 82-3663 (E.D.N.Y. April 17, 1985). Consequently, the court dismissed the claim on the ground that Lerakoli, after being given an opportunity for discovery, had failed to present any evidence of an intentional act by Pan Am, as required by federal law.[4] *See Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 536-37 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

Lerakoli now challenges the district court's rulings on several grounds. First, it contends that the terms of the Lausanne Convention relating to limitations of liability apply only to the USPS itself and cannot be extended to include agents such as Pan Am. Lerakoli further argues that a broader interpretation of the Lausanne Convention would require us not only to amend the treaty language, but also would conflict with the general principle that independent contractors performing work for the government are not immune from claims arising out of work done negligently or in an intentionally improper manner. *See Merritt, Chapman & Scott Corp.* v. *Guy F. Atkinson Co.*, 295 F.2d 14 (9th Cir. 1961); *Green* v. *ICI America, Inc.*, 362 F. Supp. 1263 (E.D. Tenn. 1973). Finally, asserting that no reason exists to create federal common law in an action between private parties, Lerakoli contests the district court's application of federal law, and its consequent failure to apply New York law, to the conversion claim. It contends that the New York rule for warehousemen, under which there would be a presumption that Pan Am had converted the packages, *see I.C.C. Metals, Inc.* v. *Municipal Warehouse Company*, 50 N.Y.2d 657, 431 N.Y.S.2d 372 (1980), should govern.

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[4]Soucol, Inc., one of the plaintiffs, also moved for partial summary judgment on the issue of liability on the conversion claim. The district court denied this motion.

II. Discussion

A. Liability Limitation Under the Lausanne Convention

The Lausanne Convention is one of an assortment of international agreements, federal statutes and agency regulations governing the transportation of domestic and international mail in the United States. Article 44 of the Convention, in pertinent part, provides that "[p]ostal administrations shall be liable only for the loss of registered items," and that "[i]n case of loss of a registered letter, the sender shall be entitled to an indemnity the amount of which shall be fixed at 40 francs [$15.76] per item."

Application of this liability provision to a carrier performing services for a postal administration has not yet been squarely addressed by the federal courts. At least one court, however, has considered a similar issue, albeit in dictum. *Caribe Diamond Works, Inc.* v. *Eastern Airlines, Inc.*, No. 71-2875 (S.D.N.Y. June 24, 1974). In *Caribe*, the sender sought to recover from the postal carrier damages arising out of the nondelivery of certain diamonds sent via registered mail from Puerto Rico to New York. While dismissing the sender's claims on the ground that it had failed to prove the carrier's responsibility for the nondelivery, Judge Brieant noted the possible application to the carrier of certain liability limitations afforded the USPS under federal regulations relating to the level of insurance coverage for a specific package. *Id.* at 18; *see* 39 C.F.R. §§ 161.2(a), 161.2 (b)(2) (1985). He posited that if the USPS were to be considered a bailee,[5] the carrier then would be a sub-bailee. As such, the carrier would be "a party to all of the express or implied rights

[5]The USPS has been characterized as a bailee of registered mail in past litigation. *United States Fidelity & Guaranty Co.* v. *United States*, 246 F. 433, 435 (9th Cir. 1917).

and privileges of its transferor [USPS] arising under the original bailment," *Caribe*, slip op. at 18-19, and, if any limitation of liability were available to the USPS, there would be "no reason why [it] should not inure to the benefit of all sub-bailees or successors in interest who acquired lawful possession from the original bailee to aid in accomplishing the purpose of the alleged bailment." *Id.* at 19.

We agree with the reasoning in *Caribe* and hold that Pan Am, as an agent of the USPS performing services that the USPS otherwise would perform pursuant to its bailment relationship with the sender, may assert Article 44 as a limitation upon its potential liability for the nondelivery. It is established common law doctrine that a sub-bailee may take advantage of a liability limitation contractually agreed upon between the original bailee and bailor. *E.g., Berger* v. *34th Street Garage*, 3 N.Y.2d 701, 703, 171 N.Y.S.2d 824, 826 (1958); *Schoeffer* v. *United Parcel Service of New York, Inc.*, 277 A.D. 569, 571, 101 N.Y.S.2d 451, 453 (1st Dep't 1950). Here, the Lausanne Convention, as part of the federal regulatory framework for the handling of international mail, prescribes some of the terms to which a sender of registered mail agrees when delivering a parcel to the USPS for transport. These terms form the equivalent of a contractual agreement between the sender and the USPS limiting the liability of the USPS, and, pursuant to agency principles, that limitation is passed on to any party performing services for the USPS.

The nature of air mail carriage under federal law compels this conclusion. While the USPS is empowered to contract with air carriers for the carriage of mail where present systems are inadequate, 39 U.S.C.A. § 5402 (West Supp. 1985), air carriers also may be conscripted to provide "necessary and adequate facilities and service for the transportation of mail" pursuant to the provisions of their certificates of public convenience and nec-

essity. 49 U.S.C.A. §§ 1371, 1375 (West Supp. 1985).[6] It would be unjust indeed to require air carriers, as a condition of their operation, to perform services otherwise the responsibility of the USPS while at the same time denying them the benefit of the USPS's liability limitation.

In addition, application of Article 44 to Pan Am is appropriate in light of the reasoning of this and other courts in decisions holding that the liability limitations for air carriers under the Warsaw Convention should be extended to employees and agents of such carriers. *E.g., Reed* v. *Wiser*, 555 F.2d 1079, 1081 (2d Cir.) (employees of air carrier may assert liability limitations under Warsaw Convention even though only air carrier itself is covered expressly), *cert. denied*, 434 U.S. 922 (1977); *Baker* v. *Landsdell Protective Agency, Inc.*, 590 F. Supp. 165, 170-71 (S.D.N.Y. 1984) (agents of air carrier may assert liability limitation under Warsaw Convention); *Julius Young Jewelry Manufacturing Company* v. *Delta Air Lines*, 67 A.D.2d 148, 151, 414 N.Y.S.2d 528, 530 (1st Dep't 1979) (same).

The liability limitation provision of the Warsaw Convention could be circumvented by a suit against an employee of a carrier, rather than against a carrier itself, without the expansive interpretation we accorded that provision in *Reed*. This would require a carrier "to provide indemnity for higher recoveries as the price for service by employees who are essential to the continued operation of its airline," *Reed*, 555 F.2d at 1082, and, in turn, would require this added expense to be passed on to airline passengers. *Id.*

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[6]While Pan Am alleges that it is a *contract* carrier for the USPS, the record is unclear as to whether Pan Am was carrying Lerakoli's mail pursuant to a contract with the USPS or pursuant to a provision in its certificate of necessity and convenience.

The implications of failing to extend the Lausanne Convention provision to agents of the USPS are no less severe. While the record reveals nothing to suggest that the USPS would be compelled to indemnify Pan Am for any recovery in this instance, it is beyond speculation that a limited interpretation of the Lausanne Convention would have a major influence on the USPS's ability to contract with airlines for the carriage of mail in the future. At the very least, air carriers would demand higher rates from the USPS for this service, with such added government costs then being passed on to the public in the form of higher postage prices. This, in turn, would be in conflict with the obvious intent of Article 44: to limit the financial repercussion of the nondelivery of registered mail on the government agency. Accordingly, Article 44 must be extended to cover the claims against Pan Am.[7]

B. The Conversion Claim

As Lerakoli frames the issue, disposition of its conversion claim depends entirely upon whether we deem federal or state common law to apply. Under federal law relating to the carriage of goods, the party asserting a conversion claim has the burden of establishing that the carrier was responsible for the loss due to some

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[7]Lerakoli's contentions relating to the ability of the court to extend the protection of the Lausanne Convention beyond that which is provided by the exact language of Article 44, and the inconsistency between such an expansive interpretation and principles governing the liability of independent contractors who deal with the government, are meritless. As to the limitations of statutory construction, a more restrictive approach than the one which we now take would not only affect Pan Am and other carriers, but, as we have stated, also would impact upon the USPS in the long-term. The interpretation which Lerakoli would have us adopt, therefore, would be in direct contravention of the underlying intent of Article 44. As to the principles governing independent contractors, such cases, which deal with issues of sovereign immunity, have little application here.

willful or intentional conduct on its part. *E.g., Glickfeld* v. *Howard Van Lines, Inc.*, 213 F.2d 723, 727 (9th Cir. 1954) (conversion claim arising under the Interstate Commerce Act); *Clairol, Inc.* v. *Moore-McCormack Lines, Inc.*, 79 A.D.2d 297, 299, 436 N.Y.S.2d 279, 280-81 (1st Dep't 1981) (conversion claim arising under the Carriage of Goods by Sea Act). By contrast, under New York law governing warehousemen, a prima facie claim for conversion is established upon proof of delivery to the bailee and of failure by the bailee to return the goods to the bailor upon request. *I.C.C. Metals*, 50 N.Y.2d at 665, 431 N.Y.S.2d at 376. The *bailee* then has the burden of proving the cause of the loss. *Id.*

The district court concluded that, like other federal provisions governing the international carriage of goods, the Lausanne Convention requires the application of federal law, and thus the court dismissed the claim since Lerakoli had not presented "one scintilla of evidence to support an inference of willful misconduct or unjust enrichment on the part of [Pan Am]." *Lerakoli II*, slip op. at 4. We agree with the district court as to the necessity for applying a federal standard of willful conduct, but also believe that in all likelihood a New York court, applying state law, would not apply the *I.C.C. Metals* rule to the facts here.

Application of federal common law to a claim depends upon a balancing of the state and federal interests affected. *In re "Agent Orange" Liability Litigation*, 635 F.2d 987, 990-95 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). "[B]efore federal common law rules should be fashioned, the use of state law must pose a threat to an 'identifiable' federal policy." *Id.* at 995; *accord Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). We find that the federal interest in maintaining a uniform scheme of regulation of international mail requires the application of uniform liability standards for claims arising from

the nondelivery of the mail. International mail delivery is regulated exclusively under federal law. Such a scheme necessarily calls for uniform liability standards.

This is not uniformity "prized for its own sake," *In re "Agent Orange" Liability Litigation*, 635 F.2d at 994, but rather it is uniformity for the preservation of federal regulatory control over the mail. If New York law applied to all cases of nondelivery of international mail arising in the state, the liability limitation of the Lausanne Convention, which we have applied to Pan Am, would be totally vitiated. Air carriers, required by federal statute to carry mail for the USPS, would then be held liable for any nondelivery unless they could set forth specific justifiable reasons for the loss of the items. Such a liability standard would not only be inequitable, given the lack of choice an air carrier has in accepting mail for delivery and its lack of knowledge of the contents of specific packages, but also would be inconsistent with federal regulation of international mail.

Conversion claims arising out of the international carriage of goods by air or sea long have been subject to federal rules relating to burden of proof. This court and other courts routinely have required the claimant to establish a defendant's willful or intentional misconduct in the prosecution of claims for nondelivery of goods under the Warsaw Convention, admiralty law and the Interstate Commerce Act. *E.g., Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d at 536-37 (Warsaw Convention); *Glickfeld* v. *Howard Van Lines, Inc.*, 213 F.2d at 727 (Interstate Commerce Act); *Insurance Company of North America* v. *Deutsche Lufthansa A/G and Summit Airlines, Inc.*, 18 Av. Cas. (CCH) 18,232 (S.D.N.Y. 1984) (Warsaw Convention); *Clairol, Inc.* v. *Moore-McCormack Lines, Inc.*, 79 A.D. 2d at 299, 436 N.Y.S.2d at 280-81 (admiralty law). The same standard should apply here.

Lerakoli's attempt to distinguish the foregoing cases on the ground that they deal with statutes or treaties which specifically regulate the relationship between the two parties at issue, whereas the Lausanne Convention merely regulates the sender's rights vis-à-vis the USPS, is unconvincing. By holding that Pan Am may take advantage of the liability limitation in the Lausanne Convention, we have concluded that the Lausanne Convention does affect the relationship between the two parties here.

Finally, even if state law were to be applied, we are not convinced that New York would apply the rule of *I.C.C. Metals.* At issue there was the liability of a warehouseman commissioned to store packages in a specific warehouse. The court reasoned that because the bailee was in sole control of the packages throughout the bailment period, it was in the best position to explain the loss of the property. *I.C.C. Metals, Inc.* v. *Municipal Warehouse Company,* 50 N.Y.2d at 665, 431 N.Y.S.2d at 377. The carriage of mail by an agent of the USPS, however, obviously is quite a different case. Mail, by its nature, does not stay in one place, but rather changes hands numerous times in transport. Consequently, the lack of control of the goods readily distinguishes this case from *I.C.C. Metals.*

III. Conclusion

For the reasons set forth above, the decision of the district court is affirmed.

Memorandum of Decision and Order of 15 February 1983 of the United States District Court for the Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LERAKOLI, INC., *et al.*,

Plaintiff,

—against—

PAN AMERICAN WORLD AIRWAYS, INC., *et ano.*,

Defendant.

MEMORANDUM OF DECISION
AND ORDER
CV-82-3663

COSTANTINO, D.J.

In the above-entitled action, three motions are before the court. Defendant United States Postal Service has moved for an order granting summary judgment dismissing the complaint against it pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons stated on the record at the hearing on these motions on January 26, 1983, the court has granted the Postal Service's motion for summary judgment.

The second motion before the court is brought on behalf of defendant Pan American World Airways ("Pan Am"). Defendant Pan Am has also moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. At the hearing on this motion, the court reserved decision. For the reasons set forth below, the court has determined that the defendant's motion for summary judgment must be denied at this time, with leave to renew if plaintiff fails to establish evidence of the alleged conversion.

Memorandum of Decision and Order of 15 February 1983 of the United States District Court for the Eastern District of New York

The facts in this case may be simply stated. The plaintiff delivered parcels to the United States Postal Service and arranged to have them mailed from New York to Belgium by registered mail. The Postal Service accepted the parcels for registered mail and delivered the parcels to defendant Pan Am to be flown to Belgium. The parcels apparently never arrived at their destination, causing plaintiff to sustain damages of allegedly over four million dollars.

This court's dismissal of the complaint against the Postal Service was predicated upon its determination that the Postal Service had tendered to the plaintiff the maximum indemnity allowed by law. It is the contention of defendant Pan Am, that as either an agent or sub-bailee of the Postal Service, it is entitled to that same limitation of liability. If this action was one limited to questions of liability based on common-law principles of bailment or negligence, the court would not quarrel with Pan Am's assertion. In a similar case, *Caribe Diamond Works, Inc.* v. *Eastern Airlines,* 71 Civ. 2875 (S.D.N.Y. June 24, 1974), Judge Brieant indicated little doubt that an air carrier in these circumstances, would be deemed a sub-bailee of the Postal Service. As such, its liability would not exceed that of the bailee from whom the sub-bailee received the original bailor's goods. *See Berger* v. *34th Street Garage, Inc.,* 171 N.Y.S.2d 824 (1958). In the case at bar, the plaintiff in addition to negligence and bailment theories, has also alleged that the loss was due to the defendant Pan Am's conversion of the parcels. It is well settled that prior limitations of liability may not be applied so as to diminish one's liability for injuries resulting from an intentional act of misconduct. *I.C.C. Metals, Inc.* v. *Municipal Warehouse Co.,* 431 N.Y.S.2d 372 (1980); Restatement, Torts 2d, §500. Policy considerations simply could not allow such limitations on liability.

Memorandum of Decision and Order of 15 February 1983 of the United States District Court for the Eastern District of New York

Accordingly, it is the order of this court that summary judgment must be denied at this time, with leave for defendant Pan Am to renew the motion should discovery by plaintiff fail to produce evidence of conversion.

The final motion before the court in this matter is plaintiff's motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, to strike Pan Am's seventh affirmative defense as legally insufficient.

In its seventh affirmative defense, Pan Am has raised the two-year limitation on actions set forth by the Warsaw Convention. It is the position of the plaintiff that this convention is inapplicable to the present dispute and therefore this defense should be stricken pursuant to Rule 12(f). For the reasons set forth below, this court agrees and thereby grants plaintiff's motion to strike.

Article 2(2) of the Warsaw Convention eliminates international mail shipments from the scope of the Convention's coverage:

> (2) This convention shall not apply to transportation performed under the terms of any international postal convention.

At the time that Pan Am was carrying plaintiff's packages, there was in effect the so-called Lausanne Convention, between the United States, Belgium, and other nations, governing the carriage of air mail between the United States and Belgium. The court has determined that the Lausanne Convention is applicable to the parties here. It is relied upon by the plaintiff in his cause of action against the Postal Service and by the Postal Service for its motion for summary judgment. Pan Am, although not a signatory of the Convention, was the self-described "agent" or

"sub-bailee" of the Postal Service, and is therefore bound by that Convention as well.

Accordingly, plaintiff's motion to strike Pan Am's seventh affirmative defense is hereby granted.

Finally, defendant Pan Am has requested that this court certify for appeal its orders denying Pan Am summary judgment and granting plaintiff's motion to strike Pan Am's seventh affirmative defense. The court is of the opinion that 28 U.S.C. §1292 is applicable to these matters and believes that an immediate appeal might materially advance the ultimate termination of the litigation.

So ordered.

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U.S.D.J.

Memorandum of Decision and Order of 17 April 1985 of the United States District Court for the Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LERAKOLI, INC., et al

Plaintiffs,

—against—

PAN AMERICAN WORLD AIRWAYS, INC., et ano.,

Defendants.

MEMORANDUM OF DECISION
AND ORDER

CV-82-3663

COSTANTINO, D. J.

Defendant, Pan American World Airways, Inc. ("Pan Am") renews its motion for partial summary judgment on the issue of liability. Plaintiff, Soucal, Ltd., cross-moves for summary judgment on the issue of liability.

By Memorandum of Decision and Order dated February 13, 1983, this court held that Pan Am was either an agent or sub-bailee of the United States Postal Service ("U.S.P.S."), and as such, plaintiffs recovery would be limited to those amounts set forth in the Lausanne Convention with respect to causes of action sounding in bailment and negligence.

Plaintiffs' complaint additionally alleged a cause of action in conversion. As to this claim it was determined that the limitation of liability would be unavailable with respect to injuries resulting from willful misconduct.

Memorandum of Decision and Order of 17 April 1985 of the United States District Court for the Eastern District of New York

Accordingly, plaintiff was given the opportunity to conduct discovery regarding its conversion cause of action. Similarly, defendant was given leave to renew the instant application "should discovery by plaintiff fail to produce evidence of conversion."

Familiarity with the court's order of February 13, 1983 is presumed. For the purposes of this motion, the issues presented are as follows:

a. whether plaintiff has established a *prima facie* cause of action in conversion, and

b. the choice of law to be applied in ascertaining the elements of such a claim.

DISCUSSION

It is plaintiffs' position that New York law should govern the within action and that in accordance therewith, the elements of a conversion action have been established. Defendant disagrees and argues that federal law is more appropriately applied in this action.

This court holds that all issues arising under the Lausanne Convention must be decided according to federal law. *Cf. Benjamin* v. *British European Airways,* 572 F.2d 913 (2d Cir. 1978). To the extent that the Lausanne Convention creates a comprehensive scheme regarding international transportation of mail it occupies the field to the exclusion of state law. *North American Phillips Corp.* v. *Emery Air Freight Corp.,* 579 F.2d 229, 233-34 (2d Cir. 1978); *see also Insurance Company of North America* v. *Deutsche Lufthansa A/G,* 83 Civ. 8231 (S.D.N.Y. September 7, 1984) (it is inappropriate to look to state law for elucidation of the standards to be applied under an international convention).

Memorandum of Decision and Order of 17 April 1985 of the United States District Court for the Eastern District of New York

Conversion by an air carrier and conversion of items placed in the mails are not areas unknown to federal law.

Accordingly, in cases involving the Warsaw Convention courts have required the plaintiff to clearly establish that the defendant air carrier contributed to the disappearance by some intentional act. *See Berner* v. *British Commonwealth Pacific Airlines, Inc.*, 346 F.2d 532, 536-37 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); *see also, Olshin* v. *El Al Israel Airlines*, 15 Av. Cas. (CCH) 17, 463 (E.D.N.Y. 1979).

The analogy is similarly drawn in cases involving common carriers operating under the Interstate Commerce Act. In such cases, courts have required the plaintiff to prove an intentional tort on the part of the carrier before the limitation upon liability is abrogated. *See Glickfeld* v. *Howard Van Lines, Inc.*, 213 F.2d 723 (9th Cir. 1954).

See also, Tishman & Lipp, Inc. v. *Delta Airlines*, 275 F. Supp. 471 (S.D.N.Y. 1967), *aff'd.*, 413 F.2d 1401 (2d Cir. 1969) wherein the court held:

> Proof of delivery to the carrier and failure to return constitute a technical conversion. The evidence has established such a conversion. However, in order to relieve the defendant [carrier] of its tariff protection, it is necessary for the plaintiff to prove more than mere technical conversion which has amounted to no more than negligence. Even gross negligence or proof that an employee of the defendant actually stole the jewelry would not suffice to render the [limitation on liability in] the tariff inapplicable . . . The plaintiff presented no evidence of conversion by the defendant itself for its own use of the lost jewelry. [*Id.* at 480-81.]

Memorandum of Decision and Order of 17 April 1985 of the United States District Court for the Eastern District of New York

and also, Franklin v. *United Airlines, Inc.*, 184 F. Supp. 814 (S.D.N.Y. 1960):

> Where there has been no willful wrongdoing by an unjust enrichment of the defendant carrier, plaintiff cannot avoid the contractual limitation of defendants' liability by characterizing a misdelivery caused by negligence or mistake, as a "conversion." [*Id.*]

The court has reviewed all of the materials submitted on the instant motion as well as the previous motion for summary judgment and finds not one scintilla of evidence to support an inference of willful misconduct or unjust enrichment on the part of defendant.

Accordingly, Pan Am's motion for partial summary judgment is granted. *Soucal, Ltd.'s* cross-motion is denied.

So ordered.

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U.S.D.J.

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of February one thousand nine hundred and eighty-six.

Present:

HON.: LAWRENCE W. PIERCE,
HON.: ROGER J. MINER, Circuit Judges
HON.: OSCAR H. DAVIS*,

LERAKOLI, INC.; LONDON STAR, NEW YORK, INC.; TACHE ET CIE, S.A.; LIEBER & SOLOW, INC.; SOUCOL, LTD.; ROUGH DIAMOND TRADERS, INC.; and SEVEN EIGHTEEN FIFTH AVENUE CORP.,

Plaintiffs-Appellants,

—against—

PAN AMERICAN WORLD AIRWAYS, INC.,

Defendant-Appellee.

Docket No. 85-7503

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

*Honorable Oscar H. Davis, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Judgment of the United States Court of Appeals for the Second Circuit

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Order of said District Court be and it hereby is Affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

ELAINE B. GOLDSMITH
Clerk

By EDWARD J. GUARDARO
Deputy Clerk

Order of the United States Court of Appeals for the Second Circuit denying rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24th day of March one thousand nine hundred and eighty-six.

LERAKOLI, INC.; LONDON STAR, NEW YORK, INC.; LIEBER & SALOW, INC.; SOUCOL, LTD.; ROUGH DIAMOND TRADER, INC.; and SEVEN EIGHTEEN FIFTH AVENUE CORP.,
Plaintiffs-Appellants,

—against—

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Appellee.

Docket No. 85-7503

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant—LERAKOLI INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

A23

Article 44 of the Universal Postal Union Convention

UNIVERSAL POSTAL UNION CONVENTION

Article 44

Principle and extent of liability of postal administrations

1. Postal administrations shall be liable only for the loss of registered items. Their liability shall be as binding for items conveyed *à découvert* as for those forwarded in closed mails.

2. Administrations may agree to total theft of or total damage to the contents of registered items being equated with the loss thereof, provided that the packing was recognized as sufficient to effectively guarantee the contents against accidental risks of theft or damage and that the irregularities in question were established before delivery of the item was taken by the addressee, or by the sender in the case of return to origin.

3. In case of loss of a registered letter, the sender shall be entitled to an indemnity the amount of which shall be fixed at 40 francs per item; this amount may be raised to 200 francs for each special bag of printed papers such as is mentioned in article 19, §11.

4. The sender may waive this right in favour of the addressee. The sender or the addressee may authorize a third person to receive the indemnity if internal legislation allows this.

5. Notwithstanding §3, the addressee shall be entitled to the indemnity after taking delivery of a totally rifled or totally damaged item where administrations make use of the option provided in §2. He may waive his rights in favour of the sender.

28 U.S.C. §1441

Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

Caribe Diamond Works, Inc. v. Eastern Airlines, Inc., No. 71-2875 (S.D.N.Y. June 24, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARIBE DIAMOND WORKS, INC.,

Plaintiff,

—against—

EASTERN AIRLINES, INC.,

Defendant.

71 Civ. 2875-CLB
40855

FINDINGS AND CONCLUSIONS

Brieant, J.

By this action commenced in the Supreme Court of the State and County of New York on or about June 3, 1971, and removed to this Court June 29, 1971, plaintiff, a corporation existing under the laws of Puerto Rico, sued Eastern Airlines, Inc., a Delaware corporation having its principal office in Florida (hereinafter "Eastern"), to recover damages arising out of the non-delivery at New York of diamonds sent there from Puerto Rico by registered United States mail. Judgment in the amount of $27,472.15 was demanded.

The single claim is pleaded as three separate causes of action. The first, based on negligence, was withdrawn. The second cause of action asserts a theory of liability for breach of an implied contract of bailment. In its third cause of action plaintiff seeks to recover as a third-party beneficiary of the contracts or arrangements for the carriage of air mail made by the United States Postal Service with defendant.

Caribe Diamond Works, Inc. v. Eastern Airlines, Inc.
No. 71-2875 (S.D.N.Y. June 24, 1974)

The Court has jurisdiction of the subject matter by reason of diversity of citizenship in a matter in which the claim exceeds the sum of $10,000.00, exclusive of interest and costs [28 U.S.C. §1332(a)(1)], and in addition may have such jurisdiction under 28 U.S.C. §§1331(a), 1339, because the action is one relating to the postal service, and because the activities of Eastern are regulated by the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*), and the Postal Service Act (39 U.S.C. §1, *et seq.*).

Defendant filed its answer on July 2, 1971. Besides pleading a general denial. Eastern asserted that the complaint does not state a claim, and that because it was required, by reason of various federal statutes, to receive and transport all mail tendered to it by the United States Postal Service, it was acting with respect to the mail as a public agent for the sovereign, as opposed to the consensual relationship of bailment. Defendant also asserts that its liability, if any, for loss or damage to U.S. mail in its custody. runs only to its principal, the United States Postal Service, and that there is no privity of contract or obligation between plaintiff and defendant giving rise to any right or claim to proceed directly against the carrier of mail. Defendant also pleaded that its liability was limited to the fine or a penalty which might be levied against it by the Postal Service, in accordance with its various regulations.

The case was tried before me without a jury on January 2 and January 11, 1974. Decision was reserved, and the briefs and post-trial memoranda of the parties have been received and considered.

Plaintiff, a diamond merchant, in 1969 purchased rough industrial diamonds in Israel, and had them sawed and polished there. The rough diamonds, bought in two lots, cost $21,514.00. Plaintiff's expenditure in Israel for cutting and polishing amounted to $2,115.23, making a total cost of $23,629.23, stated as $23,654.23 in plaintiff's deposition.

Caribe Diamond Works, Inc. v. Eastern Airlines, Inc.
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After the diamonds arrived in Puerto Rico, they comprised 147.41 carats of polished stones. Mr. Henry Reinhold, President of plaintiff, inspected the diamonds, and they were packed under his supervision into a cardboard box for mailing, measuring approximately 5¼ inches in length, 3¾ inches in width, and 2 inches in depth. The diamonds as so packaged were addressed to Reinbro Corporation (Attention: A. R.), 277 Park Avenue, New York, N.Y. 10017. "Reinbro" is an abbreviation for Reinhold Brothers, a firm affiliated with plaintiff.

Plaintiff's mailing activities were supervised by the witness Borelli, who shows a satisfactory chain of possession from the time when the 147.41 carats of diamonds were set aside for consignment to New York by Henry Reinhold, until their delivery to a messenger for transportation to the U.S. Post Office at Old San Juan Station, San Juan, Puerto Rico.

Plaintiff, as a regular user of registered mail for this purpose, had been assigned a series of parcel numbers for its use and was permitted to fill out United States Post Office Form 3877, Exhibit 2, a document by which the Postal Service acknowledges receipt of a list of registered items mailed by such a patron. The number assigned to this particular parcel was L 6-698X. In the regular course of business, the book containing P.O.D. Form 3877, already filled out in duplicate with carbon paper in it, and the package, with three others not relevant to this case, were taken to the aforementioned Post Office where a postal clerk checked the packages against the receipt form, signed one copy for plaintiff's records, and put the Post Office stamp or "plug" of the Old San Juan Station, dated November 3, 1969, thereon, to indicate receipt of the package and payment of the postage and registry fees. Plaintiff declared a value thereon of $23,000.00.

I am satisfied, based upon the Exhibits and the testimony ad-

duced before me that plaintiff has proven receipt of the package by the U.S. Postal Service at Old San Juan Station on November 3, 1969, and that the package actually contained the diamonds hereinbefore referred to, and that the value thereof at the time of shipment was $23,000.00. While the inventory value is slightly in excess of that amount, and the sum contains no allowance for profit, transportation or duty, the Court considers plaintiff estopped by its own declaration to claim here a greater value than the sum of $23,000.00 stated to the Postal Service authorities at the time of shipment. This declaration is viewed as an admission against interest.[1]

Plaintiff's registered package No. L 6-698X next came into the possession of the General Post Office at San Juan on November 3, 1969. Postal employees there prepared P.O.D. Form 3853 (Exhibit 6), recorded on its records as waybill No. 728. There, some 49 items of registered mail, all destined for the General Post Office at New York, New York (located at 8th Avenue and 33rd Street in Manhattan, hereinafter for convenience "GPO, N.Y." or "General Post Office at New York"), were placed in a mail bag, within another, locked mail bag or pouch, and were listed on Exhibit 6, with the offices of origin. Included therein was plaintiff's aforementioned registered package containing the diamonds.

This record, Exhibit 6, is regularly kept in the course of the business of the U.S. Postal Service. A copy is retained at the General Post Office in San Juan, and the original is placed in the interior mail sack, along with the registered mail listed thereon. Upon receipt of that locked bag or pouch at GPO, N.Y., the right hand side would have been torn off, stamped and dated with

[1]Plaintiff has collected the sum of $27,472.15 from its insurance underwriters against a loan receipt, and the action is in fact being maintained by the insurer as subrogee.

New York's plug, and returned to San Juan Post Office by ordinary mail. As to this waybill, no such receipt was ever returned. In the event of non-delivery, the copy of the waybill retained at San Juan is point of beginning for investigation by the Postal Inspector of non-delivery.

In the regular course of business of the Postal Service, the air mail route and flight number is entered on the waybill at two places. This particular pouch or sack is indicated as EA-928. The EA stands for Eastern Airlines, and flight 928 is the number of a regularly scheduled flight which Eastern operated from San Juan, Puerto Rico to John F. Kennedy International Airport (hereinafter "JFK") in New York City on November 3, 1969. Accordingly, this document is some evidence that the registered parcel containing plaintiff's diamonds was in fact consigned and delivered to that flight, and accepted and carried by defendant. Defendant receives such bags up to the limits of weight and volume which its aircraft can accept. Under regular procedures, it issues no detailed receipts or manifests, and obtains no record identifying what is discharged.

Testimony indicates the controverted fact of carriage by Eastern of this particular pouch cannot be determined with absolute certainty. In the event of delays or confusion between the Post Office loading dock and the airplane, the cancellation of a particular flight, or other reasons, it is possible for air mail to leave on a different flight of the same carrier, or indeed, on the aircraft of a different carrier.

An expert witness testified that with respect to practices at JFK, which he and the Court believes are followed generally in the Postal Service, it was "95% certain" that the mail would have been carried on the noted flight, and by the carrier listed on the waybill. Obviously the entry on the waybill listing the carrier

and flight is a required entry, which the form indicates is to be made by the Postal authorities, and we assume that they do not make such entry simply for a useless purpose, or other than in the regular course of business.

The designation of a flight on a waybill will be inaccurate under circumstances known in the industry as "creeping delay," that is, the cancellation or delay of a flight which results in mail which is already bagged, being taken away from that flight and given to another flight of the same carrier, or a different carrier. When this occurs, the waybill cannot be changed because it is already within the locked pouch, which is presumably then standing on a cart with other pouches on the tarmac awaiting loading. The witness Muessig explained, and the Court finds that (Tr. p. 44):

"A. . . . You can have the situation where you have a cancelled flight at the last minute. You could have a delayed flight over two hours. You could have a creeping delay in which the airline themselves don't know what time they are going to leave. They keep telling you later and later. Eventually, you take the package away.

* * *

THE COURT: A different carrier or a different flight?
THE WITNESS: Sometimes a different carrier.
THE COURT: Without changing the bill?
THE WITNESS: Yes.
THE COURT: Something can go on a different airline with a bill made out to Eastern?
THE WITNESS: Providing the airline has service.

Q. . . . it's possible to conclude, then, if things go smoothly, then, the Post Office knows what flight gets what bag of mail?

A. I would say yes."

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In 1969, in addition to Eastern, Pan American and Trans-Caribbean airlines were carrying mail from San Juan to JFK.[2]

Plaintiff has proved to my satisfaction by a preponderance of the credible evidence, that Eastern's flight No. 928 did in fact receive plaintiff's registered parcel from the Post Office. The occurrence of this fact is "more likely or probable than not," and that is the standard which we follow. *United States* v. *Masiello*, 235 F.2d 279, 286 (2d Cir. 1956, conc.op. *Frank*, J.), *cert. denied sub nom United States* v. *Stickel*, 352 U.S. 882 (1956). There is no evidence in this particular case that the flight listed was not the flight used for the shipment, or that it was late, or cancelled on that date. I find that the entry of the Postal Service made on Exhibit 6 at San Juan on November 3, 1969 was made in the regular course of business, and is valid.

Once aboard Eastern's aircraft, there is a difficulty of proof as to what happened to plaintiff's diamonds. Post Office records do not indicate whether the Post Office Air Mail Facility at JFK ("AMF Kennedy") received the bag or pouch that contained the mail with the registry numbers shown on Exhibit 6, including plaintiff's diamonds. Nor would such records be expected to show the receipt or non-receipt thereof. The pouch or mail sack was labeled directly for "New York, N.Y.", and according to the witness Muessig, would go in transit to GPO, N.Y. without being opened or recorded at AMF Kennedy.

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[2]Mail could be shifted from the carrier and flight designated on the waybill, to another flight, or a different carrier, simply by loading it on another aircraft, and this could be done without violating any postal regulation. Also, all air mail is required to be prepared ready for shipment forty-five minutes before the departure time of the aircraft, to permit loading and weighing. This is known as the "cut off time". If postal employees have a partially completed waybill in course of preparation, and don't make the cut off time for any reason, that mail would go on the next available flight, regardless of what flight might be shown on the document.

Caribe Diamond Works, Inc. v. Eastern Airlines, Inc.
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Under the circumstances affecting Exhibit 6, it would, in the ordinary course of events, be received inside the pouch at the New York, N.Y. General Post Office, and stamped and signed there to be returned to San Juan as a receipt for the entire shipment. If no such receipt were received within five days, San Juan would notify the Inspection Service, which initiates a "classified," or quasi-criminal case, and makes a detailed investigation of every step through which the pouch would have passed.

Classified files of the U.S. Postal Service showed that the pouch containing plaintiff's diamonds never reached the destination at GPO, N.Y. This was true with respect to all the registered mail listed on the waybill.

Testimony of the witness Muessig that it is "almost impossible" that the pouch did come into AMF Kennedy is not credited by the Court. The steps which the pouch would have followed is that it would be unloaded from Eastern Airlines flight No. 928 on the tarmac by personnel employed by Eastern. It would be transported from the aircraft to the postal premises referred to as the "wind tunnel" at AMF Kennedy by a motor vehicle also operated by Eastern employees. It would then be placed by postal employees in a locked truck and proceed by highway to the General Post Office, New York, N.Y., at 8th Avenue and 33rd Street, Manhattan, where another postal employee having a key to the truck would unlock it. The pouch would then be opened, receipted, and the right, or receipt half of Exhibit 6 mailed to San Juan as previously noted.

It is most likely that the pouch was stolen. But it is equally likely that it could have been stolen at any point between the unlocking of the cargo doors of the aircraft at JFK, and arrival and unloading of the locked truck at the New York General Post Office. Accordingly, plaintiff fails in its proof that the package was stolen while it was in the possession of Eastern.

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At the wind tunnel in AMF Kennedy, there is a receiving clerk employed by the postal service. He checks the label to determine whether a pouch or bag is addressed either to GPO, New York, N.Y. or AMF Kennedy (for re-sort). The bag then goes through the conveyor belt system. If consigned to GPO, New York, N.Y., it would go right from the belt onto the truck for that Post Office. As noted, there is no receipt signed at Kennedy, and no record made with respect to a pouch such as the one at issue in this case. There is no record regularly maintained to indicate that this specific pouch was discharged from the aircraft at Kennedy, or that it passed through the Air Mail Facility of the Postal Service there. All evidence is to the effect that it was never received at New York, N.Y. General Post Office.

On the entire record before me, it is equally consistent with the known facts that the theft could have occurred at AMF Kennedy, or en route to General Post Office, N.Y., or even within the General Post Office; as that it could have occurred while the package was in the possession of Eastern. This finding is made, however, recognizing that the security maintained once the pouch entered a postal service building is much greater than the security in the hands of Eastern. The truck transporting mail to the General Post Office, New York, N.Y. is locked; keys are in the possession of persons at both ends of the trip, and anyone stealing plaintiff's package would have had to steal the entire mail sack, a difficult, but not impossible task.[3]

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[3]Inspector Dolan testified:

"A. It's not been my experience while there that we could ever pinpoint any losses occurring between Kennedy and GPO New York where an employee had grabbed a whole pouch of mail. The only time we had ever arrested postal employees where an individual piece, where there may have been a bag cut, where

(Footnote continued on following page)

We now examine the evidence bearing on plaintiff's contention that the entire pouch was stolen at JFK, while in the possession of Eastern.

Postal Inspector Dolan testified for plaintiff. His duties included investigation of thefts of mail. In 1969 Mr. Dolan was investigating the theft or disappearance of the particular bag which contained the registry waybill, Exhibit 6, and was investigating other losses at JFK. There was in Inspector Dolan's words, "a pattern of losses involving the same carrier (Eastern) at that time." (Tr. p. 99). Dolan considered the mail listed on Exhibit 6 as to have been lost or stolen, and made an official investigation with respect thereto. He acted in the course of his regular duties as a postal inspector. Mr. Dolan admitted that he "couldn't pinpoint that particular loss" (Tr. p. 105) except that none of the items listed on Exhibit 6 were received at the General Post Office in New York.

Prior to November 3rd, the Postal Service had under surveillance one Perroni, an Eastern Airlines employee at JFK, and one Cappucci, who was not an employee of Eastern. These thieves, for such they were, were arrested on November 26, 1969 at 2:00 A.M. at Kennedy Airport. When arrested they had four air mail

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(Footnote continued from previous page)

one piece is taken out of a bag, or possibly employees working in a post office will grab a letter, two letters, or whatever.

BY THE COURT:

Q. But you are telling us you have never had the driver of a truck operating in the fashion in which the truck operates between Kennedy and the General Post Office in Nek York steal an entire pouch? Is that it?

A. Not during my time there, your Honor.

Q. And that is the basis on which you conclude that it did not happen to this particular pouch?

A. Yes, sir."

pouches containing registered mail which had arrived at JFK that particular night by means of an Eastern Airlines flight. They were arrested at a remote spot a mile and a half from the Air Mail Facility at JFK, but within the perimeter of the Airport property. The mail bags or pouches found in the possession of the two thieves did not include the bag of November 3rd in which plaintiff's diamonds were contained.

It is normal practice for officials investigating crimes, when they make an arrest, to conclude that the apprehended malefactors are also the authors of all crimes within the recent past evincing the same *modus operandi*. Mr. Dolan concluded that Perroni and Cappucci were also responsible for the theft from Eastern of the pouch mailed from San Juan on November 3rd. Dolan attributed to them, not unreasonably, all the thefts occurring about the same time and while Perroni and Cappucci were under surveillance. He did so, notwithstanding such surveillance had not shown them engaged in the theft of a pouch on or about November 3rd. Accordingly, he considered all such crimes, including that of November 3rd, solved. Perroni was the driver of the vehicle which met Eastern's planes on the tarmac and brought the mail from Eastern's planes into the "wind tunnel" of the Air Mail Facility. His accomplice was just an outsider.

Inspector Dolan's conclusion in this regard was eminently sensible and reasonable, and represents an inference drawn from facts, in reliance upon which the investigatory and prosecutory functions of government reasonably may be administered. But the November 26th theft certainly is not competent evidence that Cappucci and Perroni stole a particular sack of mail on November 3rd. We are unable to infer solely from the subsequent act of November 26th, coupled with the number of prior crimes affecting Eastern having the same *modus operandi*, and Perroni's presence at the scene, employed in a sensitive job, that these two

thieves were the same thieves who stole another sack from Eastern on November 3rd. *Ross* v. *Ackerman*, 46 N.Y. 210 (1871). Accordingly, there is a failure of proof that the sack was stolen at JFK while in Eastern's possession.

Assuming existence of the legal relationship of bailment between plaintiff and Eastern, plaintiff has failed to prove non-delivery, an essential element of its cause of action. The burden is upon bailor to show non-delivery by the bailee according to the terms of the implied agreement of bailment. *Roberts* v. *Chittenden*, 88 N.Y. 33, 35 (1882). Here the agreement of bailment, if there were one, a contention Eastern controverts, called for delivery to postal employees at AMF Kennedy, and plaintiff has the burden of proving the failure to do so. It is this burden it has failed to discharge, because it is just as likely as it is unlikely that such delivery was made, and the parcel stolen later.

It is therefore unnecessary to consider in depth the legal defenses raised by Eastern, previously adverted to. We should not burden this record, and our reports with *dicta*, except to note that there is substantial authority to the effect that Eastern's position in the matter is that of a mere agent or contractor employed to furnish cargo space, and that no bailment relationship arises. Further, the defendant, if regarded as an agent of the sovereign, discharging a governmental function, may be immune from liability. We do not reach these questions. Certainly there was no donative intent on the part of the Postal Service, necessary to create a third-party beneficiary relationship for plaintiff, as pleaded in the third count.

A further element is present in the case, although not adverted to. Plaintiff was a substantial user of registered mail to transport its diamonds. A person sending property by registered mail may, at his option, pay one, higher schedule of fees, for goods not covered by commercial or other insurance.

Alternatively, if as here, the goods are also covered by insurance, he may pay a lesser fee, in which event Postal Service liability is limited to a maximum of $1,000.00 subject to the co-insurance pro-rating of recovery as to that amount, if the deductible limit on the private insurance is less than $1,000.00. See 39 C.F.R. §§161.2(a) and 161.2(b)(2). Exhibit 2 in this case shows plaintiff paid $3.45 surcharge, precisely equal to the fee for a registered parcel valued, in 1969 at $23,000.00, and covered by commercial insurance. See 39 C.F.R. §161.2(a), Rev. January 1, 1969.

If the Postal Service be regarded as a bailee, Eastern, as a carrier of mail, which received possession of the chattel, not from plaintiff but from the Postal Service, should be regarded as a sub-bailee. The Postal Service had at least implied authority to transfer possession to a scheduled airline. As such transferee of possession, Eastern is a party to all of the express or implied rights and privileges of its transferor arising under the original bailment. If, as is apparently the case, the original bailee (Postal Service) limited its liability to $1,000.00 or less by agreement, or as a result of an election, or unilateral action taken by the shipper having the effect of an agreement, then there seems to be no reason why this limitation should not inure to the benefit of all sub-bailees or successors in interest who acquired lawful possession from the original bailee to aid in accomplishing the purpose of the alleged bailment. See *Robinson* v. *New York & T.S.S. Co.*, 63 App. Div. 211, 71 N.Y.S. 424 (1st Dept. 1901); *White* v. *Weir*, 33 App. Div. 145, 53 N.Y.S. 465 (1st Dept. 1898). This point was not argued, and of course it is unnecessary for us to reach it, since we find that the plaintiff failed to prove Eastern's non-delivery by a preponderance of credible evidence.

All motions to strike evidence as to which decision was reserved at the trial are denied. It is adjudged that all relief shall

be denied. The Clerk of this Court is directed to enter judgment to that effect in accordance with Rule 58(1), F.R.Civ.P.

The foregoing constitutes findings of fact and conclusions of law pursuant to Rule 52, F.R.Civ.P.

Dated: New York, New York
June 24, 1974

CHARLES L. BRIEANT, JR.
U.S.D.J.

Designation of Corporate Relationships

Lerakoli, Inc., et al., filing this petition for a writ of certiorari as petitioners in this proceeding state that:

1. This is their original Designation of Corporate Relationships pursuant to Rule 28.1.

2. Seven Eighteen Fifth Avenue Corp. is a wholly-owned subsidiary of Harry Winston, Inc.

Supreme Court, U.S.
FILED
AUG 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2109

In The
Supreme Court of the United States
October Term, 1985

LERAKOLI, INC.; LONDON STAR, NEW YORK, INC.; TACHE ET CIE, S.A.; LIEBER & SOLOW, INC.; SOUCOL, LTD.; ROUGH DIAMOND TRADERS, INC.; and SEVEN EIGHTEEN FIFTH AVENUE CORP.,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 15, 1986

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was the court below correct in applying federal common law to a dispute concerning whether an international mail carrier is entitled to the benefit of the limits of liability contained in the Lausanne Convention, which governs the international carriage of mail?

2. If federal common law is not applicable to the dispute in question, did the court below have subject matter jurisdiction over a non-diverse party pursuant to the principles of pendent jurisdiction, where the action was removed from a state court, where the basis of the removal was federal question jurisdiction over another party, and where the action is based upon a single nucleus of operative facts?

3. If federal common law is applicable to the dispute in question, was the court of appeals correct in holding that "[u]nder federal law relating to the carriage of goods, the party asserting a conversion claim has the burden of establishing that the carrier was responsible for the loss due to some willful or intentional conduct on its part"?

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No. 85-2109

In The

Supreme Court of the United States

October Term, 1985

LERAKOLI, INC.; LONDON STAR, NEW YORK, INC.; TACHE ET CIE, S.A.; LIEBER & SOLOW, INC.; SOUCOL, LTD.; ROUGH DIAMOND TRADERS, INC.; and SEVEN EIGHTEEN FIFTH AVENUE CORP.,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, Pan American World Airways, Inc. ("Pan Am"),[1] respectfully submits this brief in opposition to Petitioners' Petition for a Writ of Certiorari.

[1]Respondent's designation of corporate relationships pursuant to Rule 28.1 of the Rules of this Court is as follows: Pan Am is a wholly-owned subsidiary of Pan Am Corp., a Delaware corporation.

INTRODUCTION

Petitioners assert that their petition should be granted on the grounds that the instant action involves significant issues with respect to: (1) the exercise of pendent-party jurisdiction; (2) the creation of federal common law; and (3) the applicability to an allegedly negligent agent of a statutory limitation of liability under federal common law. Petitioners further contend, with respect to each of these issues, that the Second Circuit's ruling herein is contrary to a decision of this Court. (P. 4)[2]

As will be demonstrated below, the Second Circuit's holding on each of the foregoing issues is based upon, and is entirely consistent with, this Court's prior decisions. Moreover, in asserting both their questions presented and their argument, Petitioners frame the substantive common law issue in terms of the law applicable to negligent agents, while conveniently ignoring settled federal common law relating to the burdens which must be overcome in order to prevail upon a claim arising out of international carriage by air or sea. Similarly, Petitioners neglect to indicate that their pendent-party jurisdiction argument was raised for the first time in a motion for rehearing in the court of appeals and was summarily rejected.

In short, this case presents no unusual questions, no conflict with established authority, and no reason to burden this Court's calendar.

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[2]References in the form "P. —" are to the Petition for Certiorari herein.

POINT I

THE FEDERAL COURTS HAVE SUBJECT MATTER JURISDICTION OVER THIS ACTION

Petitioners apparently accept the settled rule that the federal courts have "federal question jurisdiction" over actions decided under federal common law. *See, e.g., National Farmers Union Ins. Co. v. Crow Tribe of Indians,* — U.S. —, —, 105 S. Ct. 2447, 2451 (1985); *Illinois v. City of Milwaukee,* 406 U.S. 91, 100 (1972). Faced with this settled doctrine, Petitioners nevertheless assert that the federal courts lack subject matter jurisdiction over this action *vis-a-vis* Pan Am because: (a) the lower courts improperly applied federal common law to Petitioners' claim against Pan Am; and (b) there is no other foundation—including pendent jurisdiction—upon which subject matter jurisdiction may be based.[3] Petitioners are wrong on both counts.

A. The Courts Below Properly Applied Federal Common Law To The Dispute Between Petitioners And Pan Am

Although Petitioners repeat the oft-quoted statement in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78 (1938) that there is "no federal general common law," there is no question that this Court has applied federal common law in various circumstances. *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964); *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943). The very cases

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[3]This action was removed from the New York State courts to the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1441.

upon which Petitioners rely, *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981) and *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966), recognize both the existence and application of federal common law.

In *Texas Industries, Inc.*, this Court endorsed the application of federal common law to disputes touching upon the duties of the United States or interstate or international relations—matters which are clearly present here.

> [O]ur federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control. [451 U.S. at 641; footnotes omitted].

The Second Circuit was undoubtedly relying upon the rule in *Texas Industries, Inc.*, when it applied the Lausanne Convention[4] to the instant dispute and held that "[i]nternational mail delivery is regulated exclusively under federal law. Such a scheme necessarily calls for uniform liability standards." (783 F.2d at 37; A. 10).[5]

In addition, the Second Circuit specifically relied upon *Wallis v. Pan American Petroleum Corp., supra*, in holding that " 'before federal common law rules should be fashioned, the use of state law must pose a threat to an "identifiable" federal policy.' " (783 F.2d at 37; A. 9). It was for the very reasons articulated in *Wallis* that the

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[4]The Lausanne Convention is formerly known as the Universal Postal Union, 27 U.S.T. 345, T.I.A.S. No. 8231, entered into force January 1, 1976.

[5]References in the form "783 F.2d at —" are to the Second Circuit opinion herein, *Lerakoli, Inc., et al. v. Pan American World Airways, Inc.*, 783 F.2d 33 (S.D.N.Y. 1986). References in the form "A. —" are to the Appendix to the Petition for Certiorari herein.

Second Circuit found federal common law applicable to this action:

> [T]he federal interest in maintaining a uniform scheme of regulation of international mail requires the application of uniform liability standards for claims arising from the nondelivery of the mail. [783 F.2d at 37; A. 9-10].

Moreover, the Second Circuit's decision also conforms with this Court's decision in *Miree v. DeKalb County*, 433 U.S. 25 (1977), which Petitioners also cite. Relying upon its earlier decision in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), the Court in *Miree* found that the application of federal common law is appropriate where resolution of the claim in question would have a direct effect on the United States or its treasury. 433 U.S. at 29. In the instant action, the Second Circuit found that a failure to apply federal common law to Petitioners' claim against Pan Am would have just such an effect.

> The implications of failing to extend the Lausanne Convention provision to agents of the USPS [United States Postal Service] are no less severe. While the record reveals nothing to suggest that the USPS would be compelled to indemnify Pan Am for any recovery in this instance, it is beyond speculation that a limited interpretation of the Lausanne Convention would have a major influence on the USPS's ability to contract with airlines for the carriage of mail in the future. At the very least, air carriers would demand higher rates from the USPS for this service, with such added government costs then being passed on to the public in the form of higher postage prices. This, in turn, would be in conflict with the obvious intent of Article 44: to limit the financial repercussion of the nondelivery of registered mail on the gov-

> ernment agency. Accordingly, Article 44 must be extended to cover the claims against Pan Am. [783 F.2d at 36-37; A.8; footnote omitted].

Finally, apparently recognizing that the Second Circuit's application of federal common law to the case at bar is completely consistent with this Court's prior rulings, Petitioners suggest that the Second Circuit's decision is inconsistent with its own earlier ruling in *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). This suggestion is also incorrect.

In *Agent Orange*, the Second Circuit declined to apply federal common law to the claims of Vietnam veterans who alleged that they were injured in the line of duty by chemical defoliants produced by the defendants. In reaching that conclusion the Second Circuit relied on the *absence* of two factors, *both of which are present* here. First, in *Agent Orange* the Second Circuit noted that the United States was not a party to the action; here it is a party in the person of the United States Postal Service. Second, the *Agent Orange* court noted that the case did not involve a "federal regulatory scheme"; here such a scheme is clearly present.

In the case at bar, the Second Circuit based its opinion largely upon the existence of such a regulatory scheme.

> Here, the Lausanne Convention, as part of the federal regulatory framework for the handling of international mail, prescribes some of the terms to which a sender of registered mail agrees when delivering a parcel to the USPS for transport. These terms form the equivalent of a contractual agreement between the sender and the USPS limiting the liability

> of the USPS, and, pursuant to agency principles, that limitation is passed on to any party performing services for the USPS.
>
> The nature of air mail carriage under federal law compels this conclusion. While the USPS is empowered to contract with air carriers of mail where present systems are inadequate, 39 U.S.C.A. § 5402 (West Supp. 1985), air carriers also may be conscripted to provide "necessary and adequate facilities and service for the transportation of mail" pursuant to the provisions of their certificates of public convenience and necessity. 49 U.S.C.A. §§ 1371, 1375 (West Supp. 1985). It would be unjust indeed to require air carriers, as a condition of their operation, to perform services otherwise the responsibility of the USPS while at the same time denying them the benefit of the USPS's liability limitation. [783 F.2d at 36; A. 6-7; footnotes omitted].

In sum, the Second Circuit's application of federal common law to the case at bar squares precisely with well-settled principles set forth in this Court's prior decisions. Since the existence of a federal common law question vests the federal courts with subject matter jurisdiction pursuant to 28 U.S.C. § 1331, Petitioners' remaining subject matter jurisdiction arguments, even if they were correct, which they are not, would be moot. Certiorari should be denied on this ground alone.

B. Assuming Arguendo That Federal Common Law Is Not Applicable To The Instant Action, The Lower Courts' Exercise Of Subject Matter Jurisdiction Was Proper Pursuant To Principles Of Pendent Jurisdiction

As the second prong of their subject matter jurisdiction argument, Petitioners assert that if federal common law is,

in fact, inapplicable to the instant controversy, federal jurisdiction would be lacking and, therefore, this matter should be remanded to the New York State courts. In this regard, Petitioners recognize that there are two potential bases for subject matter jurisdiction in addition to "federal question" jurisdiction—pendent party jurisdiction and jurisdiction pursuant to the "entire case" removal provisions of 28 U.S.C. § 1441(c). Petitioners assert that neither of those bases is appropriate here. Just as with their "federal question" argument, Petitioners are incorrect with respect to these arguments as well.

As a threshold matter, even if Petitioners' arguments were not devoid of merit, they would be a particularly inappropriate basis for granting certiorari. This Court will generally not consider issues which have not been raised in the lower courts. *See Lawn v. United States,* 355 U.S. 339, 362-63, n.16 (1958). Here, although Petitioners artfully avoid alluding to the treatment of their subject matter jurisdiction arguments in the courts below, the fact remains that their pendent-party and Section 1441(c) arguments were never addressed, much less decided, by either the district court or the Second Circuit. Those arguments were first raised in Petitioners' motion for reargument in the court of appeals and were summarily rejected. (A. 22).

Thus, since these contentions were not raised until after the court of appeals decision was written, there is no lower court decision for this Court to correct; there is no lower court decision in conflict with prior decisions of this Court; and there is no lower court decision which, if employed as precedent, would serve as a watershed for a body of wrongly decided law in the lower courts. In short, irrespective of the correctness of Petitioners' position, the

granting of certiorari here would serve no purpose other than to permit Petitioners to attempt to vindicate their own interests; it would lead to neither clarification nor correction of existing law.

Moreover, not only are Petitioners' pendent-party and Section 1441(c) arguments a particularly inappropriate basis for granting certiorari, they are also incorrect. *Aldinger v. Howard*, 427 U.S. 11 (1976), upon which Petitioners so heavily rely, does not support their claim that pendent-party jurisdiction over Pan Am is lacking. The Court's decision in *Aldinger* was extremely narrow. It limited its holding to a ruling that pendent-party jurisdiction could not be asserted over a state law claim against a county arising out of the same nucleus of operative facts as a federal claim brought pursuant to 42 U.S.C. § 1983, under which counties were specifically excluded as potential defendants. The reason for the decision is clear; any other result would have rendered nugatory Congressional determination that counties should not be sued in the federal courts on Section 1983 claims.

Significantly, the *Aldinger* Court took pains to indicate the extremely limited nature of its holding: "we decide here only the issue of so-called 'pendent-party' jurisdiction with respect to a claim brought under §§ 1343(3) and 1983." 427 U.S. at 18. The Court expressly declined "to lay down any sweeping pronouncement upon the existence or exercise of such [pendent-party] jurisdiction." *Id.* *Aldinger* specifically recognized the existence of numerous court of appeals decisions endorsing the very type of pendent-party jurisdiction Petitioners attack (427 U.S. at 6, n.5) and clearly left those decisions undisturbed.

Since this case does not involve 28 U.S.C. §§ 1343(3) and Section 1983, the statutes involved in *Aldinger,* and since Congress did not specifically exclude mail carriers from coverage by the Lausanne Convention (indeed, the Second Circuit found that Congress intended the Lausanne Convention to cover mail carriers, 783 F.2d at 36; A. 6), Petitioners' *Aldinger* argument is totally inapposite to the case at bar.

Petitioners' final jurisdictional argument—that there is no subject matter jurisdiction over the claim against Pan Am pursuant to 28 U.S.C. § 1441(c), which allows removal of the entire case when a removable claim is joined with an otherwise non-removable, separate and independent claim—may be quickly disposed of. *American Fire & Casualty Co. v. Finn,* 341 U.S. 6 (1951), upon which Petioners rely for the proposition that the "state claims against Pan Am are not 'separate and independent' from those against the Postal Service" (P. 6), was an action in which the removable claim was based upon diversity. Here, due to the application of the Lausanne Convention the concededly removable claim against the Postal Service is based on federal question jurisdiction. Unlike a diversity case, when a "federal question" case is removed any state claims involved are either closely enough related to be pendent and removable under 28 U.S.C. § 1441(b) or sufficiently "separate and independent" to be removable under Section 1441(c). *See* 1A J. Moore, Moore's Federal Practice ¶ 0.163[4.-5] at 339 (2d ed. 1986); 14A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3724 at 400 (2d ed. 1985). Moreover, this Court need not even reach the Section 1441(c) issue, since by virtue of the applicability of federal common law, federal question jurisdiction is clearly present here.

In sum, Petitioners' subject matter jurisdiction arguments are neither novel nor correct. They present no reason for granting the Petition.

POINT II

THE SECOND CIRCUIT CORRECTLY APPLIED SETTLED PRINCIPLES OF FEDERAL COMMON LAW TO THE INSTANT ACTION

Petitioners' final argument in support of their contention that certiorari should be granted is based upon the claim that even if federal common law is applicable to the present action, the Second Circuit departed from established principles in holding that Pan Am is entitled to the protection of the limitation of liability provisions of Article 44 of the Lausanne Convention. (P. 10). It is respectfully submitted that Petitioners' assertion is totally incorrect.

In fact, the Second Circuit relied entirely upon established precedent in concluding that the "application of Article 44 to Pan Am is appropriate in light of the reasoning of this and other courts in decisions holding that the liability limitations for air carriers under the Warsaw Convention should be extended to employees and agents of such carriers." (783 F.2d at 36; A. 7). *See, e.g., Reed v. Wiser,* 555 F.2d 1079, 1092-93 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977); *Baker v. Lansdell Protective Agency, Inc.,* 590 F. Supp. 165, 170-171 (S.D.N.Y. 1984); *Julius Young Jewelry Manufacturing Co., Inc. v. Delta Air Lines,* 67 A.D.2d 148, 151, 414 N.Y.S.2d 528, 530 (1st Dept. 1979).

The Second Circuit was on equally solid precedential ground when it held that "[u]nder federal law relating to the carriage of goods, the party asserting a conversion

claim has the burden of establishing that the carrier was responsible for the loss due to some willful or intentional conduct on its part." (783 F.2d at 37; A. 8-9). *See, e.g., Glickfeld v. Howard Van Lines, Inc.*, 213 F.2d 723, 727 (9th Cir. 1954); *Insurance Company of North America v. Deutsche Lufthansa A/G and Summit Airlines, Inc.*, 18 Av. Cas. (CCH) at 18,232 (S.D.N.Y. 1984).

In the face of the Second Circuit's clear reliance upon established precedent with respect to the federal common law applicable herein, Petitioners point to *Robert C. Herd & Co., Inc. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), which held, based upon the precise language of the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5), that a stevedore is not entitled, on an agency theory, to the limitation of liability accorded to a carrier under that Act. From this holding Petitioners' attempt to jump to the conclusion that Pan Am should not be accorded the benefit of the limitation of liability provisions of the Lausanne Convention. That jump cannot be made. As the Second Circuit recognized, Pan Am is a "carrier," a stevedore is not; the carriage of mail involves responsibility for an item changing hands numerous times, stevedoring does not; the Lausanne Convention is part of an overall regulatory scheme relating to a vital government function, the Carriage of Goods by Sea Act is not.

Finally, Petitioners contend that in addition to *Herd* the Second Circuit failed to distinguish or discuss two other cases decided by this Court, *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939), and *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922), which concern the liability of government contractors (P. 11-12). Once again,

Petitioners are incorrect. The Second Circuit specifically addressed both cases, as well as the "precise language argument" of *Herd,* in footnote 7 of its opinion:

> [Petitioners'] contentions relating to the ability of the court to extend the protection of the Lausanne Convention beyond that which is provided by the exact language of Article 44, and the inconsistency between such an expansive interpretation and principles governing the liability of independent contractors who deal with the government, are meritless. As to the limitations of statutory construction, a more restrictive approach than the one which we now take would not only affect Pan Am and other carriers, but, as we have stated, also would impact upon the USPS in the long-term. The interpretation which [Petitioners] would have us adopt, therefore, would be in direct contravention of the underlying intent of Article 44. As to the principles governing independent contractors, such cases, which deal with issues of sovereign immunity, have little application here. [783 F.2d at 37; A. 8].

In sum, Petitioners' contention that the courts below did not apply settled principles of federal common law to the case at bar is totally unfounded; it provides no basis for granting the Petition.

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CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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